

EXHIBIT 28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA EAGLES	.	No. 2:21-cv-01776-MMB
LIMITED PARTNERSHIP,	.	
	.	
Plaintiff,	.	United States Courthouse
	.	601 Market Street
v.	.	Philadelphia, PA 19106
	.	
FACTORY MUTUAL	.	November 17, 2021
INSURANCE COMPANY,	.	1:58 p.m.
	.	
Defendant.	.	
.	(Courtroom 3A)

MOTION TO REMAND HEARING
BEFORE HONORABLE MICHAEL M. BAYLSON
SENIOR UNITED STATES DISTRICT COURT JUDGE

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1 (Court in session at 1:58 p.m.)

2 JUDGE MICHAEL M. BAYLSON: Okay. Good afternoon,
3 everyone.

4 ALL: Good afternoon, Your Honor.

5 THE COURT: All right. Please be seated. The
6 lighting seems to be low in this -- is that -- can we --

7 THE CLERK: I have a call in.

8 THE COURT: Okay. Thank you.

9 Okay. We're here today for argument in a case
10 captioned Philadelphia Eagles Limited Partnership vs. Factory
11 Mutual Insurance Company, civil action, 21-1776.

12 Present for the Plaintiffs are Linda Kornfeld. Good
13 afternoon.

14 MS. LINDA D. KORNFELD: Good afternoon.

15 THE COURT: Charles Fitzpatrick. Good afternoon.
16 And Judge Giles.

17 MR. JAMES T. GILES: Good afternoon, Your Honor.

18 THE COURT: Good afternoon to you.

19 MR. CHARLES A. FITZPATRICK, IV: Good afternoon, Your
20 Honor.

21 THE COURT: And for the Defendant, Richard Gable, Jr.
22 and Adam Masef. Okay.

23 MR. RICHARD D. GABLE, JR.: Good afternoon.

24 THE COURT: All right. We have -- just by way of
25 history, this is a case which was removed by the Defendant from

1 the Common Pleas Court in Philadelphia. The complaint sought a
2 declaratory judgment concerning an insurance policy issued by
3 the Defendant arising out of the other court case. The dispute
4 arises out of the well-known COVID-19 epidemic -- pandemic,
5 whatever you may want to call it, that has affected our society
6 in many severe ways.

7 And I had an argument in this case in July -- July
8 1st, I think, which as I characterize, it was mainly procedural
9 to ascertain what was happening with the case relative to some
10 other cases and we were all aware that there was a case pending
11 in the Third Circuit which was -- a decision was handed down
12 August 18, 2021, in *DiAnoia's Eatery*, D-I-A-N-O-I-A, *DiAnoia's*
13 *Eatery vs. Motorists Mutual Insurance Company*, 10 F.4th 192.
14 And after that decision came down, I allowed the -- I invited
15 counsel to file supplemental memorandum, which both sides did,
16 and then I listed it for this argument, and as I frequently do,
17 I sent counsel a few questions.

18 And what we're going to do is first proceed with the
19 questions in my letter of November 16th and give each side just
20 a few minutes to answer each question and then I will have a
21 couple of other questions that were not in my letter and then
22 I'll give each attorney a chance to sum up or say anything else
23 that they want to say that they haven't said so far. And then
24 I will take the matter under advisement. I don't intend to
25 make any decision today.

1 And with that, let me -- I want to make one comment.

2 In reading the supplemental briefs, both sides
3 asserted that the Third Circuit's decision in *DiAnoia's Eatery*
4 supported their position. I want to make it clear to both of
5 you that neither -- in my view, neither of you are correct. I
6 do not consider that opinion to have decided this case. If it
7 did, I wouldn't be having this argument. I view the Third
8 Circuit's opinion as a important direction to District Courts
9 as to the things that should be considered by us in resolving
10 these issues on -- on -- on insurance -- on a motion for
11 declaratory judgment concerning insurance coverage and I do not
12 -- do not -- do not waste your time telling me that you won
13 your -- that the Third Circuit supported your position. What
14 the Third Circuit did is -- it in some detail went through the
15 eight factors that a judge has to consider. The only thing the
16 Third -- or did hold is that the three -- three judges whose
17 opinions were under review, I think there were three, did not
18 explore the issues carefully enough. So that's why I scheduled
19 this argument and that's why I'm going to have these eight
20 questions.

21 So what we're going to do is I'm going to read the
22 factors off and because this is a motion to remand by the
23 Plaintiff, I'm going to ask the Plaintiff counsel to speak
24 first and then Defense counsel. All right? And -- and then
25 we'll move on to the next one. And I'm going to limit you to

1 just a couple of minutes on each point. And what I usually do
2 and I will do in this case, then when we're all done, I will
3 give you a chance to file a very short supplemental memorandum,
4 if you want to, because of something you left out or you want
5 to remake, remembering the famous politician who said there
6 were always three speeches. There was the one the politician
7 prepared, there was the one the politician delivered, and there
8 was the one the politician wished they had delivered. And that
9 applies to lawyers too. So if you forget to say anything or
10 you don't have enough time, you'll get a chance to put it in a
11 short supplemental memorandum and we'll talk about the due date
12 for that.

13 Okay. So item number one is the likelihood that a
14 federal court declaration will resolve the uncertainty of
15 obligation which gave rise to the controversy.

16 All right. Who wants to -- Ms. Kornfeld, you want to
17 argue these or Mr. Fitzpatrick?

18 MS. KORNFELD: Yes, Your Honor, I'll be arguing.

19 THE COURT: Go ahead.

20 MS. KORNFELD: Your Honor, we -- in reading very
21 carefully -- and I -- and I pronounce it wrong every time, so
22 I've started to refer to it as the Eatery case, *DiAtona's*
23 [sic] --

24 THE COURT: Yeah.

25 MS. KORNFELD: In reading carefully the Third

1 Circuit's opinion in *DiAtona* -- *DiAtona's Eatery*, we -- we do
2 not intend to tell you today that we won and we should all go
3 home now. We do believe that what the Court did in that case
4 was focus in on the third factor -- the third *Reifer* factor,
5 which is the public interest in settlement of the
6 uncertainty --

7 THE COURT: All right. Well, I'll come to the third
8 *Reifer* factor. If you don't think they've talked about number
9 one, just say that.

10 MS. KORNFELD: Your Honor, I believe they spoke about
11 number one, but I believe that their conclusion was that this
12 Court could resolve the issues in this case and, therefore,
13 factor number one did not weigh in favor of remand.

14 THE COURT: Okay. All right. Mr. Gable.

15 MR. GABLE: We would agree. We would agree, Your
16 Honor. We think that the --

17 THE COURT: Okay. Okay.

18 MR. GABLE: -- that factor --

19 THE COURT: All right, factor number two, the
20 convenience of the parties; Ms. Kornfeld.

21 MS. KORNFELD: Your Honor, we think that factor is
22 neutral.

23 THE COURT: Okay. Mr. Gable.

24 MR. GABLE: Your Honor, we -- we would say that it's
25 neutral or it's to our -- in favor of keeping the case here. I

1 mean, the Plaintiff --

2 THE COURT: Why?

3 MR. GABLE: -- is a Philadelphia entity and, you
4 know, there's no reason not to keep the case right where it
5 sits. It's about as convenient as it gets.

6 THE COURT: All right. All right, three, the public
7 interest in settlement of the uncertainty of obligation.

8 MS. KORNFELD: Your Honor, we believe that is the key
9 factor and that that factor weighs in favor of the Court
10 exercising its discretion to remand the case to allow the state
11 court, the Court of Common Pleas, to address novel and
12 unsettled rules of state insurance law.

13 THE COURT: All right. Mr. Gable.

14 MR. GABLE: Your Honor, we would agree that it -- it
15 is the issue that the court left open for the -- for the courts
16 to analyze. I mean, I think they -- they remanded on all the
17 issues, for consideration of all the issues, but that's the one
18 that got the most attention. You know, our view of that is
19 that the court made clear that novel facts don't make novel
20 legal issues. And I think that was the argument we made here
21 the first time and -- and so not to claim victory, but -- but
22 we think that -- that what the court said is, in order to
23 articulate a basis for remand, we need to show that there's
24 truly an undetermined issue of state law that requires the case
25 be in state court, that this court can't address, like all the

1 other federal courts that have addressed insurance coverage
2 issues dealing with COVID, that there's an issue here that's
3 different and it's so weighty that this Court would need to
4 send the case back to state court. So I feel we may want to
5 address that in a little more detail, because I do think that
6 that --

7 THE COURT: All right. Well, this -- this goes back
8 to -- this will come up again under my question number three,
9 about the record. Okay. All right. We can come back to that.

10 All right, four, the availability and relative
11 convenience of other remedies; Ms. Kornfeld.

12 MS. KORNFELD: Your Honor, we believe that -- that is
13 a neutral factor.

14 THE COURT: Mr. Gable.

15 MR. GABLE: Right, Your Honor, and we think it weighs
16 back in favor of keeping the case here. There are no -- the
17 only real remedy that's available is a decision on the
18 declaratory judgment action and it's currently in front of Your
19 Honor. So there's really no reason for this case to go any
20 -- any place else. You can grant complete relief.

21 THE COURT: Well, if -- if I were to -- if I were to
22 decide this -- if I were to say I'm going to deny the motion to
23 remand and I'm going to deny the motion to dismiss, that means
24 -- how would the case proceed in this court under that
25 scenario?

1 MR. GABLE: So we would begin discovery and we would
2 begin --

3 THE COURT: Well, do -- do -- but I thought your
4 position in your motion to dismiss is that this is clear as a
5 matter of law that you're entitled to have the complaint
6 dismissed?

7 MR. GABLE: Correct, Your Honor. And we would assume
8 that if you denied that, you would tell us why you thought we
9 were wrong. And so if you -- if you felt that you denied the
10 motion to dismiss and that there were, you know, factual issues
11 that required or -- or that Plaintiff was entitled to discover,
12 then I think we would -- we would move into the discovery phase
13 of the case. It's also possible, Your Honor, you could tell us
14 that you think we're wrong and that the Plaintiff is right and
15 in -- in that context, I assume that Plaintiff would take some
16 additional steps.

17 THE COURT: Well -- well -- well wait a minute.
18 Let's just pause for a minute. If I -- if I were to agree with
19 you completely, I would deny the motion to remand and I would
20 grant the motion to dismiss and the case would be over. Right?

21 MR. GABLE: Correct.

22 THE COURT: And the Plaintiffs could appeal. Okay?
23 If I deny the motion to remand and I also deny the motion to
24 dismiss, because I may feel there's some factual issues, I may
25 -- I may not identify all the factual issues. I may say that

1 this has to go into discovery and that I -- I would want to
2 listen to counsel more before I would determine what were
3 factual issues.

4 Your -- your position would be, I presume, that
5 whatever facts -- that unless some factual dispute was genuine
6 -- was genuine and material, using the language of Rule 56,
7 that you'd be entitled to summary judgment. Right?

8 MR. GABLE: That's correct, Your Honor.

9 THE COURT: Okay. Can you envision any scenario in
10 which this case would go to trial in this court?

11 MR. GABLE: It is -- I mean, it is possible in this
12 case. You know, and Plaintiffs have argued in their complaint
13 that they can prove that their stadium, for example, was
14 damaged by the presence of COVID. While we disagree with that,
15 we don't think legally their -- their position is accurate. It
16 is, at least, theoretically possible and there are at least
17 -- I believe, within -- around the country, there may have been
18 one or two cases that have actually gone to trial. So it is
19 possible, but I would agree with the Court, it's very unlikely
20 that the case could go to trial if the Court were to find a
21 dispute of fact.

22 THE COURT: Well, if I did, what -- what -- how else
23 could it be resolved?

24 MR. GABLE: Right.

25 THE COURT: So, in that event, you agree there could

1 be a trial?

2 MR. GABLE: That's correct.

3 THE COURT: Now, why would a trial be better here
4 than in state court?

5 MR. GABLE: Well, I would say a trial here would be
6 better in that the case is already here. I think the federal
7 court would permit -- there's no witnesses that we wouldn't be
8 able to bring into court. They would all be within the
9 subpoena power of -- of the Court. And I can't see any reason
10 why a -- a jury at city hall, should the case, you know,
11 proceed to a jury, would -- would be any different than a jury
12 here. I guess there would be a bit of a different jury pool,
13 but -- but on the whole, I -- I don't think -- I mean, I think
14 a jury -- I think the case here would be better, frankly,
15 humbly, because I -- I -- I, frankly, think federal procedure
16 is more streamlined, but I don't know if that's what you're --
17 what you're asking me about.

18 THE COURT: All right. Ms. Kornfeld, you want to
19 respond to that, to what Mr. Gable just said? You don't have
20 to, but if you want to, you can.

21 MS. KORNFELD: Well, Your Honor, I would. And I
22 would -- I would point out that, you know, we -- we are
23 involved in a number of these COVID cases with different
24 clients, with different facts and the issues here for the
25 Eagles are unique from other cases that we're involved in

1 because, one, we have Pennsylvania law and the Third Circuit
2 law. We have something -- you know, we have a case called *Port*
3 *Authority* and another case in Pennsylvania called *Hardinger* and
4 both of those courts have stated that you don't need to
5 actually see a broken table or a broken roof in order to
6 trigger coverage under property policy. It's enough that you
7 can have enough of a dangerous substance in the air space of
8 your building to create coverage. The question is whether you
9 have enough of a dangerous air space -- dangerous substance in
10 your building.

11 So whether this is a case that could proceed to
12 trial, we think it's quite likely that it could proceed to
13 trial with experts battling each other as they were in the *Port*
14 *Authority* case and as the court directed -- as the Third
15 Circuit directed the trial court to delve into in *Hardinger*
16 over the factual question of, you know, the extent to which the
17 air space at the stadium was dangerous and so we think science,
18 experts, and battling experts on that science would -- would be
19 something that could press this case to trial.

20 With respect to the courtroom, that would be better
21 situated to have this trial. It -- it is our view that there
22 is a very important issue in this case with respect to
23 regulatory estoppel and we -- you know, what little facts we've
24 been able to glean from the public record before we've been
25 able to conduct discovery of FM's files shows us that when FM's

1 was seeking to get the regulators to approve its contamination
2 exclusion, it made statements that appear not to be accurate
3 and so we will be pursuing a regulatory estoppel claim and we
4 believe that the state courts --

5 THE COURT: Well, that -- that --

6 MS. KORNFELD: -- are uniquely positioned to --

7 THE COURT: Well, let me --

8 MS. KORNFELD: -- to police those regulatory issues.

9 THE COURT: Let me ask you about the regulatory
10 estoppel, because I saw that in your brief and the Defendant's
11 assert that it's really nothing to do with this case. I mean,
12 this -- isn't this case determined by the -- the terms of the
13 -- of the insurance policy?

14 MS. KORNFELD: Your --

15 THE COURT: Do you -- do you have any authority that
16 in determining a case like this, with this declaratory
17 judgment, for an insurance -- for a insurance policy that
18 regulatory estoppel is -- is a factor?

19 MS. KORNFELD: Yes, Your Honor. It's the
20 *Sunbeam* case from the Supreme Court of -- Pennsylvania Supreme
21 Court, where the court said that regulatory estoppel, what an
22 insurer says to its regulator when it's, for example, seeking
23 to get approval of a new exclusion, and if what the insurer
24 says is not accurate, it's up to the courts in Pennsylvania to
25 police that issue. And regulatory estoppel is -- you know,

1 it's not a theory that is accepted in all states and, in fact,
2 many states don't, but Pennsylvania does, New Jersey does, and
3 in -- in cases where regulatory estoppel is at issue, the
4 courts have said that even if the insurance policy -- the
5 exclusion you're looking at and the one we're talking about
6 here is the contamination exclusion, even if the court
7 determines that it is clear and unambiguous on its face as to
8 its application, because the insurer misrepresented to the
9 regulator the impact of the new language when it was seeking to
10 get it approved, that's enough for the court to prevent
11 enforcing that exclusion against the policy holder.

12 THE COURT: All right. Briefly, Mr. Gable, what's
13 your position on that argument on regulatory estoppel?

14 MR. GABLE: Your Honor, first of all, the key issue
15 for today's purpose is whether the law on regulatory estoppel
16 is uncertain such that this Court has to remand the case to
17 state court because it can't apply Pennsylvania law and
18 regulatory estoppel. We'd suggest that a -- a quick Westlaw
19 search would show that more than a dozen cases in this district
20 alone have dealt with similar arguments at the motion to
21 dismiss state.

22 THE COURT: Yeah, but this is a diversity case, so I
23 have to apply Pennsylvania law.

24 MR. GABLE: No. Understood. And even under
25 Pennsylvania law, courts in this -- in this -- in the Eastern

1 District, other judges here have already dealt with this issue
2 of regulatory. It's not uncertain. The legal construct behind
3 the regulatory estoppel argument is not uncertain or in
4 dispute. We would -- as to the merits of the argument, we
5 would say that what they have pointed to belatedly in their
6 most recent briefing, which was not part of their original
7 complaint, it is not really briefed in the motion to dismiss,
8 is a document from the state of Illinois from 2006 in which
9 Factory Mutual changed its -- added a definition of
10 contamination to its policy form. It made an editorial change
11 to the policy form to define what it was meant by
12 contamination. That's all it did. And it didn't -- it -- what
13 regulatory estoppel is designed to apply to is where Factory
14 Mutual takes one position in front of the regulators and tries
15 to take a different position when it comes to its policy
16 holders.

17 THE COURT: Right. Okay. Well --

18 MR. GABLE: It didn't do that.

19 THE COURT: All right. Ms. Kornfeld, I -- I -- I
20 don't think regulatory estoppel is in your complaint, so the
21 question is whether you feel you want to amend your complaint
22 to add a -- a cause of action under that. I'm not telling you,
23 you have to, but I think you ought to think about that.

24 MS. KORNFELD: Your Honor, one thing that we would,
25 at the end of the conversation regarding remand, like to

1 discuss with you is that the -- the world of COVID coverage is
2 ever evolving. As much as we're learning about the virus as
3 the days go on and on, we're learning a lot more about the
4 coverage. And what I mean by that is some of the cases against
5 Factory Mutual, for example, have proceeded past the motion to
6 dismiss phase and discovery is happening and there is
7 information coming out that we didn't have access to when we
8 drafted our complaint.

9 THE COURT: Yeah. I'm not being critical, I'm just
10 saying that --

11 MS. KORNFELD: We --

12 THE COURT: -- when I read your brief, you -- you
13 discuss regulatory estoppel as a theory of recovery and -- but
14 it's not in your complaint. So I think you ought to make some
15 decision as to whether you would want to amend your complaint.
16 I mean, I would be inclined to allow you to do that because
17 this is in a very early stage. And I'm not sure -- so I -- I
18 think you ought to discuss that with your client and let me
19 know if you want to do that or not. And I don't know if the
20 Defendant would object or not, but I would be inclined to allow
21 it, just so you have all your theories, you know, in black and
22 white on -- on paper.

23 MS. KORNFELD: Your --

24 THE COURT: So you --

25 MS. KORNFELD: Your Honor, we --

1 THE COURT: -- you ought to -- you ought to consider
2 that.

3 MS. KORNFELD: We -- we have and we've -- we've
4 actually reached out to the other side to ask if they agree to
5 let us amend our complaint. It may be premature at this point,
6 because the remand issue hasn't been decided, but if the Court
7 were to decide to keep our case, we would, the next day, be
8 asking to amend our complaint in light of what's come up since.

9 THE COURT: Well, if -- if I grant the motion to
10 remand, obviously, it's -- it's moot.

11 MS. KORNFELD: Right.

12 THE COURT: I -- I no longer have the case and you
13 can, you know, talk about it in the Third Circuit or on the --
14 on Common Pleas Court. But, you know, I think the Defendant
15 would have a right to appeal if I granted the remand and if you
16 -- you should think whether -- if that happens and you're
17 arguing in front of the Third Circuit, somebody in the Third
18 Circuit might ask you, well, why didn't you take up the
19 invitation to amend your complaint? I'm not -- I'm not going
20 to answer that question for you, but I think you ought to think
21 about it.

22 MS. KORNFELD: Thank you, Your Honor.

23 THE COURT: All right. Let's go to question number
24 -- factor number five, a general policy of restraint when the
25 same issues are pending in a state court.

1 Now, I should add to this number five is that there
2 are some cases that say that it should be the same issues in
3 state court and the same parties and some of the cases you've
4 both cited on this issue make that point that it will be the
5 same parties. Now, you've -- you've all discussed the *Sammy*
6 (Phonetic) case or the *Summy* case, S-U-M-M-Y, and I don't
7 consider that case to be particularly controlling about what I
8 should do, because in that case, and that was my colleague,
9 Judge Robreno, was reversed, because the case pending in state
10 court was actually between the same parties and the First
11 Circuit relied heavily on that fact in saying that Judge
12 Robreno should have granted the motion to remand.

13 Now, here, we don't have any case pending in state
14 court between the -- you two parties, the Eagles and -- and
15 Factory Mutual. But I wonder whether the cases that say it has
16 to be the same parties are strictly applicable when we are
17 talking about a huge block of litigation that -- and that has
18 arisen out of this terrible pandemic that has affected every
19 aspect of human life on the entire planet, not just in the
20 Eastern District of Pennsylvania or the state of Pennsylvania.

21 So it seems to me that the fact that the same issues
22 are pending in state court is relevant here, even though
23 they're not in front of the same parties, but I leave that --
24 you have any comment, Ms. Kornfeld, on that?

25 MS. KORNFELD: Yes, Your Honor. It is our view -- we

1 -- we read the Eateries' opinion and saw the Eateries'
2 discussion -- the -- the Third Circuit discussion of factor
3 five in that opinion and acknowledging that there are
4 circumstances where you may have an issue that is being
5 addressed by multiple parties who are not the same parties, but
6 in state court and same issue that's being addressed in federal
7 court. And -- and that might suggest that the fifth factor
8 would weigh in favor of remand and then the court ultimately
9 decided not because it thought it could create a mess.

10 But I think if there's any scenario where the fifth
11 factor should be used to weigh in favor of remand, where you've
12 got multiple parties arguing the identical issue, this would be
13 the circumstance. It is extremely unusual to have a situation
14 like this, where you have so many litigants arguing over the
15 same thing at the same time. You know, I -- I've been
16 practicing as a coverage lawyer since 1991 and I've not seen a
17 situation like this, so if there were a circumstance where the
18 fifth -- the fifth factor would promote the interest of justice
19 and allow for judicial economy and avoid waste of judicial
20 resources at the federal court level, including both in your
21 courtroom and in the Third Circuit. It would seem that this
22 would be that circumstance, given the number of litigants
23 addressing the same issues in state court right now.

24 THE COURT: All right. Mr. Gable.

25 MR. GABLE: Your Honor, I think -- well, what Ms.

1 Kornfeld just argued is -- is exactly what the Third Circuit
2 said was not to be considered, that -- that I think our reading
3 of that case is that it is this -- you know, this -- this body
4 of law grows out of issues in the third party liability realm
5 and it is not uncommon that there is an ongoing suit, whether
6 it be a tort action or a coverage action in state court and an
7 insurer goes to federal court in order to get relief on a
8 declaratory judgment action while there are a -- the same case
9 or a very similar case pending in state court.

10 And -- and our read of *DiAnoia's Eatery* is the Third
11 Circuit was reminding the trial level courts that -- that
12 simply because COVID cases are being litigated is not enough to
13 put the fifth factor weighing in favor of remand, that it
14 should be not only the same issues, but the same parties. And
15 the second part of that is, if you look at Plaintiff's
16 complaint and their arguments both on the motion to dismiss and
17 the motion to remand, they have argued several occasions that
18 the Factory Mutual policy is unique, that its grant of coverage
19 is unique, that its contamination exclusion is unique, and so
20 under the, you know, Title, you can't have your cake and eat it
21 too. I don't believe you can say that -- that Factory Mutual's
22 policy is unique and yet say that all of these other cases that
23 are preceding in the state court have some connection with this
24 litigation.

25 So for -- for those reasons, Your Honor, we don't

1 believe that the fifth factor weighs in favor of remand. In
2 fact, we don't think -- we think it's clear that there are no
3 other cases out there involving the contract between Factory
4 Mutual and the Philadelphia Eagles and that's the relevant
5 consideration for this Court.

6 THE COURT: All right. Thank you.

7 All right. The sixth factor is avoidance of
8 duplicative litigation. That's somewhat similar to the fifth
9 factor. Ms. Kornfeld, what's your view?

10 MS. KORNFELD: Your Honor, we agree that it is --
11 that the fifth factor, as I was just arguing it, is -- is
12 similar. And -- and I note that we do believe that we should
13 prevail on a motion to dismiss -- overcoming a motion to
14 dismiss because of the unique nature of the language in the FM
15 policy and our unique facts, but there are cases presently
16 pending in the state court that have, for example, the same
17 contamination exclusion we're addressing here. We presented
18 those cases to Your Honor when we were here last time and so
19 while there are many issues, policy language -- different
20 policy language at issue in cases in -- in --

21 THE COURT: Well, but -- but you're -- you -- I think
22 your answer somewhat contradicts what you said about the fifth
23 factor. You said for the fifth factor it had to be the same
24 parties. Now you're telling me under the sixth factor that --

25 MS. KORNFELD: No, no, no, Your Honor. I'm sorry.

1 No. I -- my argument with respect to the fifth factors is that
2 in the context of COVID it need not be the same parties.

3 THE COURT: Okay. All right. Well, then you're both
4 in agreement on that.

5 Okay. All right. The seventh -- oh, Mr. Gable,
6 anything you want to say on the sixth factor?

7 MR. GABLE: No, Your Honor. I -- I -- I think Your
8 Honor can give complete relief. There would be no need for any
9 further litigation and so this case will resolve it, so we
10 believe the sixth factor weighs in favor of keeping the case
11 here.

12 THE COURT: All right. Seventh factor, prevention of
13 the use of the declaratory action as a method of procedural
14 fencing or as a means to provide another forum in a race for
15 res judicata. Ms. Kornfeld.

16 MS. KORNFELD: Your Honor, I -- I -- I believe that
17 the Plaintiffs in these cases have an interest in having these
18 state court issues resolved in state court and the Defendants
19 have an interest in having these cases resolved in federal
20 court. I don't think anyone is playing games or engaged in
21 procedural fencing. I think it's just the reality of the
22 strategic determinations by the parties between the different
23 court systems.

24 THE COURT: All right. Mr. Gable.

25 MR. GABLE: Yeah, Your Honor, I think -- I think, as

1 I said before, this -- this -- this factor comes up where there
2 might be litigation in state court brought by one of the
3 parties and the other party runs to federal court and -- and
4 it's basically saying, listen, if that was the case, remand may
5 be appropriate because the -- the court shouldn't --

6 THE COURT: Well, that's the *Summy* case.

7 MR. GABLE: Right. And -- and what we're saying, in
8 this case, a first party case, there's really -- first party
9 property case, there's really no reason to consider this factor
10 at all because it -- it's really not relevant. But -- but it
11 -- to the extent the Court considers it, it surely doesn't
12 favor remand.

13 THE COURT: Well, let me -- let me ask you both a
14 slightly -- a -- a different question on -- on a similar issue.
15 I -- we have had many judges in this court, including myself,
16 who have had strictly coverage issues presented on COVID-19. I
17 had several against a company called Cincinnati and I granted
18 summary judgment -- or I think I -- it was either summary
19 judgment or I granted a 12(b)(6) motion because the policy was
20 clear -- there was a clear exclusion for something like COVID-
21 19 coverage.

22 And how does -- Ms. Kornfeld, how does this case
23 differ from those?

24 MS. KORNFELD: Well, I was prepared to argue this in
25 detail last time we here, Your Honor, and I've been focused on

1 the remand motion today, but I -- I can tell you that the
2 -- and, in particular, the cases that were presented to you,
3 Your Honor, I believe they had a -- an ISO virus exclusion,
4 which was the virus exclusion created by the Insurance Services
5 Office back in 2006.

6 THE COURT: The -- I think they did. You're right.
7 But you have a -- we'll come -- you have a virus exclusion in
8 this policy too.

9 MS. KORNFELD: We have -- we have a contamination
10 exclusion and for many --

11 THE COURT: Which includes virus under the definition
12 of contamination.

13 MS. KORNFELD: It includes the word virus, but for
14 many complex reasons that go into looking at the policy
15 language, the totality of the policy language, including what
16 Factory Mutual said when it was trying to get this language
17 approved with the regulators, we believe that there -- there
18 needs to be discovery to determine what this exclusion actually
19 applies to, if it applies at all.

20 THE COURT: All right. Mr. Gable.

21 MR. GABLE: Your Honor, I -- we would suggest that
22 this case is really not much different than the case that you
23 decided. The Factory Mutual policy only insures direct
24 physical -- for damage. We don't believe that the presence of
25 a virus causes -- damages property, and we don't believe that

1 -- you know, the theory here -- counsel mentioned the *Port*
2 *Authority* and the *Hardinger* cases in her earlier comments. The
3 difference here is that in order to fill the stadium, assuming
4 you could fill the stadium with COVID virus to the point you
5 would make it uninhabitable, the only way to do that would be
6 to inhabit the stadium. And, in fact, the reality that we know
7 now, a year later, is that COVID within the community is --
8 there's probably more cases in the community today than there
9 were this time last year, yet Plaintiff is holding games where
10 there's 67,000 people in that stadium every Sunday. So if
11 COVID was really damaging the property, there shouldn't be
12 anybody there now. Not to mention that the standard under the
13 *Port Authority* and *Hardinger* cases is that you have to make the
14 property uninhabitable.

15 In -- in this case, the property was inhabited. They
16 -- they -- the entire 2020 home schedule of the Philadelphia
17 Eagles went off as scheduled. The only difference was, there
18 was some limited -- either there were 1500 fans or some
19 slightly greater amount of fans, but the stadium was inhabited,
20 games were played, the practice facility was used, so the
21 standard in those cases is extraordinarily high for good
22 reason, because there is no physical damage to property.

23 And so from that perspective, Your Honor, we -- we
24 -- we feel that -- that they -- that this Court should not
25 allow this case to go forward on discovery because it's a

1 burden that can't be met even accepting what's been pled in the
2 complaint.

3 Secondly, as to the contamination exclusion, Your
4 Honor, other courts throughout the country have -- have granted
5 motions to dismiss, have found that the Factory Mutual
6 contamination exclusion also applies under these facts and so
7 we briefed that in our -- in our motion to dismiss and -- and
8 -- and we -- it has a virus, you know, in the definition of
9 contamination, and we believe it -- it -- it squarely applies.
10 So we believe if the Court were to allow the case to stay here
11 and were to consider our motion to dismiss on the merits, we
12 think we would be successful.

13 MS. KORNFELD: Your Honor --

14 THE COURT: Do you want to briefly respond?

15 MS. KORNFELD: Yes. Your Honor, with respect to the
16 trigger question --

17 THE COURT: Yes.

18 MS. KORNFELD: -- the -- the question under *Hardinger*
19 and -- and *Port Authority* is -- is the extent to which the air
20 space within -- well, the air space, that was *Port Authority*,
21 and the groundwater, which was *Hardinger*, is rendered dangerous
22 because of a foreign substance, an invisible substance that's
23 imperceivable to taste and smell.

24 So, at least in the Third Circuit, the argument
25 that's being addressed elsewhere in the country about whether

1 you need a broken pipe or a broken roof, in the Third Circuit,
2 you don't need that. It's sufficient to have an invisible
3 substance making a place dangerous. The question is, is there
4 enough of it to make it dangerous enough to impact its
5 function? It is not true that the standard is
6 uninhabitability. While that word is used in the *Port*
7 *Authority* case, there's also reference to loss of utility and
8 loss of function. The function of a football stadium is to
9 have sixty-some odd thousand people in their stands, hugging,
10 screaming, yelling, doing all kinds of things to cause aerosols
11 to come from them and go to others, but, you know, that's a
12 fact question, the extent to which the stadium was made
13 dangerous and whether we could --

14 THE COURT: Well, but --

15 MS. KORNFELD: -- get our full utility from the
16 stadium.

17 THE COURT: But your -- your claim is that, you know,
18 the last -- the last season, you were unable to use the
19 stadium. Isn't that -- isn't that basically what your claim
20 is?

21 MS. KORNFELD: Yes, Your Honor.

22 THE COURT: Yeah, that last season. I mean 20 --
23 2020. We're now in 20 --

24 MS. KORNFELD: We lost the utility --

25 THE COURT: -- now -- you're now in 2021 and -- and

1 you're using the stadium, so Mr. Gable has a point that you
2 -- you haven't been deprived of it permanently, but that you
3 still have your claim that you couldn't use it in 2020; is that
4 right?

5 MS. KORNFELD: There's -- there's no requirement that
6 you have permanent loss of function in order to trigger
7 coverage. And there's no question that since 2020, we have
8 vaccines, we have masks, we have other activities in which
9 business owners have engaged to make the gathering of people
10 together a much safer experience. So we are -- this case is
11 focused on what happened in 2020 and what the circumstances
12 were, what the science was back then.

13 Also, with respect to, you know, the -- the
14 -- whether coverage was triggered, there is -- you know, when
15 we filed our complaint, as I said earlier, there was no
16 discovery that had been conducted of Factory Mutual by anybody.
17 And since then, there is discovery that has been conducted and
18 we are in the process of trying to get access to that discovery
19 to determine what Factory Mutual was saying behind the scenes
20 when it was drafting this policy language and its view as to
21 coverage for these kinds of things, that it was saying
22 internally, not in briefs that were filed by Factory Mutual
23 once the policy holders were filing these cases.

24 And then with respect to the exclusion, we -- there's
25 a multitude of arguments as to why we -- we believe factual --

1 THE COURT: No. I don't want you to go through all
2 the argument.

3 MS. KORNFELD: Yeah.

4 THE COURT: They're -- they're in your brief.

5 MS. KORNFELD: But I would say, Your Honor, that so
6 much has happened since we briefed these issues that if you
7 were to keep the case -- well, one, we would -- we do plan to
8 amend our complaint, and as a result of that, re-briefing would
9 likely happen, but if for some reason the amended complaint
10 were not accepted, we would ask that the Court provide the --
11 the -- both -- both sides the opportunity to update the Court
12 with respect to the facts that have developed since we last
13 briefed, the law that has developed and the arguments that have
14 been determined based upon the developed facts and law.

15 THE COURT: All right. Well, I -- yeah. Let me just
16 address your last comment. You know, neither I or many judges
17 here -- I think this was true when your colleague, Judge Giles,
18 was here. We don't accept correspondence about new
19 developments, you know, as having any relevance. If you feel
20 that you need to add facts to your complaint, you've got to
21 file an amended complaint or a supplemental complaint under
22 Rule 15. I'm not looking for updates as to the situation. I'm
23 not a -- this is not a weather station. Okay? So you have to
24 make a strategic decision.

25 Now, I said before, you know, if you -- you -- you

1 want to think about amending about regulatory estoppel. You
2 may have other reason to amend. I'm not making any promise
3 that I'm going to decide these motions in the next week. I'm
4 going to -- I consider these important and I -- and -- very
5 important, not only for you, the parties here, but also for,
6 you know, establishing, you know, a precedent that other judges
7 may want to follow or not follow.

8 And so the one thing I'll say is that I -- if you
9 decide to amend the complaint promptly, I'm not going to
10 consider that as relevant as to whether I should remand or not.
11 I don't want you to think that if I -- if you amend that that's
12 a reason I should deny the motion to remand. So put that out
13 of your mind, because I -- I wouldn't do that. Okay?

14 MS. KORNFELD: Thank you, Your Honor.

15 THE COURT: All right. Let's go to number eight. In
16 the insurance context an inherent conflict of interest between
17 an insurers duty to defend in the state court and its attempt
18 to characterize that suit in federal court as falling within
19 the scope of a policy exclusion.

20 All right. Well, both of you have addressed this in
21 part in the prior discussion. What's your brief response to
22 this one, Ms. Kornfeld?

23 MS. KORNFELD: Your Honor, we don't believe that this
24 factor bears on the considerations before the Court here.

25 THE COURT: All right. Mr. Gable?

1 MR. GABLE: Yeah. Your Honor, we don't believe that
2 it supports a remand in this case.

3 THE COURT: Okay. Okay. All right. Now, let me go
4 to other questions in my letter. So both the *Reifer* case, R-E-
5 I-F-E-R and the Third Circuit's opinion in the -- the *DiAnoia's*
6 *Eatery* case refer to the record. This is not one of the eight
7 factors. And I just want to make sure I understand what your
8 position is as to what the record -- what the Third Circuit
9 meant by the word record. And whether that's other state court
10 decisions or the contents of the pleadings or the briefs or
11 something else.

12 So, Mr. Gable, I'm going to let you go first for this
13 one.

14 MR. GABLE: Thanks, Your Honor. I -- our, if you
15 look at -- if you look at the opinion and you read some of the
16 other Third Circuit decisions, it seems that the standard is to
17 show that there is truly a, you know, undecided issue or
18 uncertain issue within the state courts. And so if you look at
19 *Reifer*, for example, there was case law in the Commonwealth of
20 Pennsylvania that -- appellate case law that held that in the
21 context of a claims made policy that an insurer did not need to
22 show prejudice for a late notice defense. And in the context
23 of an occurrence based policy it did. And the claimant in that
24 case made an argument that said that it couldn't get relief in
25 this court because if the court applied the law as it was on

1 the books, she wouldn't have -- she wouldn't win because the
2 argument she was making is that the law that was on the books
3 was contrary to the intent of the Pennsylvania Supreme Court
4 and its rules of professional conduct. And so that the only
5 way that she could get relief for her, what was truly a novel
6 argument, was to go to state court. And so in that case I
7 think the court looked at the existence of appellate case law
8 in the Commonwealth that was in -- on conflict. As well as the
9 fact that the Pennsylvania Supreme Court was the one who put
10 the rules in the rules of professional conduct.

11 THE COURT: Okay.

12 MR. GABLE: In *Summy*, which is another case, there
13 was --

14 THE COURT: Well, we discussed *Summy* already.

15 MR. GABLE: Right. But on -- I was just on the
16 standard, on the issue of what the record was.

17 THE COURT: Yeah.

18 MR. GABLE: The issue -- in *Summy* the record was
19 there was an appellate court, a superior court decision that
20 held that there was an exclusion that would apply. And there
21 was another panel of the superior court considering the same
22 issue that had asked, even with knowledge of the first superior
23 court decision, had requested en banc argument. This was
24 clearly a split that the court identified as being one of the
25 factors.

1 So to answer your question, and if I went on longer
2 than need by, I apologize. We think that you'd have to show
3 that there's truly uncertain or undetermined law that this
4 Court wouldn't be able to apply and that you would need to
5 submit the case to the state court in order for Plaintiff to
6 obtain relief.

7 THE COURT: All right. Ms. Kornfeld?

8 MS. KORNFELD: Your Honor, I just -- Your Honor, I
9 would just want to follow up on one point, which is the
10 standard for remand is not that there's an issue of law that
11 this Court could not apply, it's a question of whether in the
12 interest of justice and given the state interest in insurance
13 issues the Court should apply or rule on that piece of law.
14 But that's irrespective of the question that you asked me,
15 which is what we believe the record would look like. And I
16 think the best way to answer that question would be to look at,
17 you know, one of the two issues that the *Eatery's* court seems
18 to have sent back for further explanation to the district
19 courts is the question of whether Plaintiff suffered physical
20 loss or damage from a government order. The question of
21 whether the Plaintiff suffered physical loss or damage is, you
22 know, short formed in -- to being discussed as the quote,
23 unquote, trigger question. The trigger question where the
24 court who that, you know, this issue has come back to the
25 federal court that put that issue before the circuit court.

1 And the federal court is going to have to build a record around
2 the question of whether phys -- whether Plaintiff suffered
3 physical loss or damage from a government order.

4 From our perspective the record will be one,
5 identifying what the court believes is the nov -- the novel or
6 unsettled rule of state law. And then in identifying it it's
7 then explaining why its novel or unsettled. So with respect to
8 the trigger question, prior to COVID, the -- no appellate
9 court, whether that's the Superior Court or the Supreme Court
10 in the state of Pennsylvania stated the standard for
11 determining what direct physical loss or damage means as a
12 trigger provision in a property policy. That standard didn't
13 exist.

14 Post-COVID, there are a number of courts in the state
15 of Pennsylvania, state, you know, trial courts that are ruling
16 on that very specific issue. And those rulings are in conflict
17 with each other. So prior to COVID, there was no legal
18 authority to explain and provide guidance to a federal court
19 regarding what those terms mean and how they apply. Now there
20 are a number of state courts who are ruling inconsistently.
21 And that tells me that there is an unsettled issue of state law
22 with respect to that issue.

23 THE COURT: Okay. Well, let me ask you this. You
24 know, as I indicated before, in the pure coverage, the sort of
25 garden variety coverage question that we get frequently, before

1 COVID and nothing to do with COVID. I think all the judges in
2 this court have had these cases have been consistent that
3 there's no coverage for COVID under the terms of those
4 policies, such as *Cincinnati*.

5 Now you're saying, your argument here is that the
6 language in this policy is different. Is that your most
7 important argument?

8 MS. KORNFELD: That is an important argument, Your
9 Honor.

10 THE COURT: All right. Okay. Are you also saying
11 that we were wrong in all these other decisions where we denied
12 coverage or you don't want to take a position on that?

13 MS. KORNFELD: Your Honor --

14 THE COURT: And you don't -- I'm not trying to put
15 you in a box. If you don't want to express it to me, you've
16 got your policy, you don't have to express any opinion. But if
17 you think we were wrong, I mean I'd like to know that and why.

18 MS. KORNFELD: Your Honor, I don't want to call
19 anyone wrong. The extent to which a ruling may be -- may have
20 been a correct or incorrect application of the policy language
21 by federal courts in this -- by judges in this courthouse,
22 again depends on policy language and it depends on the
23 allegations in the complaints at issue. So to the extent --
24 and the business at issue. I believe, Your Honor, that whether
25 coverage is triggered under these policies is a very factual

1 issue and it depends on the nature of the business at issue.
2 So that if you have a business where one person comes in your
3 business daily and you're shut down and you're saying it's
4 COVID and you're losing all this money, the risks associated
5 with the spread of COVID in your business are quite small. And
6 whether you meet the standard under *Port Authority* or *Hardinger*
7 or other cases given that factual scenario is different than if
8 you have a football stadium where the whole point is to have,
9 you know, 70,000 people there together.

10 So I believe whether the trigger language is
11 appropriate for denying coverage or granting coverage depends
12 significantly on the facts. But what I do know is that the
13 trigger language was sent back to one of the courts right when
14 the -- when the Third Circuit ruled so that they, that court,
15 could make a better record as to why it's novel. And with
16 respect to that particular case, there's no question that the
17 issue of trigger is very much unsettled in the state courts.
18 And we'd be happy to present the Court with the rulings that
19 have come out of the state courts so far showing the complete,
20 you know, different judges having very different views on the
21 same language. And that to us says it's unsettled. And it
22 being unsettled would mean that that would be a reason for a
23 federal court to let the state courts figure it out at the
24 appellate court level and ultimately the supreme court level so
25 that the federal court judges do not need to spend the

1 resources in their courtrooms on an issue that they're
2 predicting but that is in the process the live and very active
3 process of getting resolved at the state court level. It will
4 be before the Pennsylvania Supreme Court very short -- very
5 shortly.

6 THE COURT: Mr. Gable, anything briefly on that? I
7 think you've covered it.

8 MR. GABLE: Nothing to add, Your Honor.

9 THE COURT: All right. I want to go to the question
10 3C. And I'd like a yes or a no. Absent all other Reifer
11 factors, is the existence of unsettled or novel state law
12 issues alone enough to warrant or deny remand? Mr. Gable,
13 what's your answer -- what's your position on that?

14 MR. GABLE: I'll do my best to get to yes or no. The
15 only -- the only caveat I would say, Judge, is I don't think
16 the rulings that I looked at say that. I don't think there's
17 an answer to that question. We looked because you posed the
18 question to us. We would say that there doesn't appear to be
19 an example of a case that was remanded where only one factor
20 weighed in favor of remand. But I didn't see anything in the
21 Third Circuit cases addressing this that said it was
22 impossible. So if that's my best answer --

23 THE COURT: Okay. Fair enough. Ms. Kornfeld?

24 MS. KORNFELD: Yes.

25 THE COURT: Yes? Okay. I'm not going to go through

1 four. I'll give you a chance if -- here's the thing. I have a
2 couple of other questions to ask. And I'll come back to that.

3 All right. I want to go to two of the arguments that
4 have been made by the Plaintiff. And this arises out of the
5 policy language. Which I thought I have here. Let me -- wait
6 a minute. Just one second.

7 Okay.

8 THE LAW CLERK: Do you want me to grab them?

9 THE COURT: Yeah. Listen, it's right on my desk with
10 your little yellow -- I stuck some yellow papers in it. I
11 thought I brought them in here.

12 THE LAW CLERK: The policy itself?

13 THE COURT: Yeah, it's the policy itself. But it has
14 your little yellow tabs. It has some yellow -- just get --
15 I'll ask another question while my law clerk is getting that.

16 One of the things, Mr. Gable, that the Plaintiff's
17 have brought out was that in a different case pending in the
18 District of New Mexico entitled *Factory Mutual Insurance*
19 *Company versus Federal Insurance Company*, a civil action, 17-
20 760. The lawyer for your client there, whose name is Maureen
21 Sanders, wrote a brief in which she took the position that mold
22 infestation was covered under the policy. And she said mold
23 infection -- infestation as well as the costs incurred to
24 remediate it and return the facility to its pre-loss condition
25 is not physical loss under the federal insurance company

1 policy. And she wanted -- your client wanted to exclude any
2 evidence of that.

3 And then on page 3 of the brief she -- it says it is
4 undisputed that the mold infestation destroyed the aseptic and
5 rendered room 152 unfit for its intended use, manufacturing
6 injectable pharmaceutical products. Numerous courts have
7 concluded that the loss of functionality or reliability under
8 similar circumstances constitutes physical loss or damage.
9 That appeared to me to be somewhat inconsistent with the
10 arguments you're making here. Do you have any comment on that?

11 MR. GABLE: Well, a couple of things, Your Honor.
12 First of all, it was mold in a clean room. This was an area
13 where you, I believe, they manufactured computer chips. And so
14 -- and if I'm wrong about that, I apologize. But it was a
15 clean room. And the question was would mold infestation in
16 that situation constitute physical loss or damage under the law
17 of the state, which I believe you're correct, Your Honor, it
18 was New Mexico.

19 So from that standpoint we would say, A, it's
20 factually dissimilar. B, it's mold. And I think, and again, I
21 don't want to become a medical professional that I'm not trying
22 to be, but in my experience mold actually, you know, physically
23 consumes building products. That if you have drywall and mold
24 sits on drywall it actually consumes the drywall. It doesn't
25 just float in the air. In particular in that case the mold I

1 would have rendered the, you know, the room unfit because, A,
2 it would have damaged the building materials it was on. And,
3 B, it sounds like in the context of a clean room, you probably
4 can't go forward with whatever you're doing if it's, you know,
5 if the environment is different.

6 THE COURT: Right.

7 MR. GABLE: So I don't know. And I think we
8 addressed this in our brief on the motion to dismiss. So I
9 apologize that I'm --

10 THE COURT: Yeah, I think you did.

11 MR. GABLE: I'm not --

12 THE COURT: All right. Anything you want to say
13 briefly, Ms. Kornfeld, on that? I mean it's in your brief.

14 MS. KORNFELD: Yes, Your Honor. The key with respect
15 to that statement made by Factory Mutual long before COVID was
16 the focus on loss of functionality. Factory Mutual now, at
17 least with respect to the COVID cases, is saying that loss of
18 functionality is not the question. The question is have you
19 physically -- do you have physical damage that you can look at
20 to your structure. And that's loss or damage. Here they're
21 saying that physical loss can be loss of functionality. And
22 functionality is the standard that we're relying upon in
23 significant part with respect to our stadium. The Eagles still
24 had a stadium. I believe that FM is saying the stadium was
25 standing, you could walk into it and therefore you have no

1 covered loss. And our argument is, but we lost -- we --

2 THE COURT: Okay.

3 MS. KORNFELD: -- functionality.,

4 THE COURT: Thank you. All right. Next question.

5 There's a citation here to a Judge -- a case that Judge Glazer
6 has in the Court of Common Pleas in which he issued a footnote
7 order in which he denied pending preliminary objections. And
8 it would seem to me that that case raises similar issues,
9 although the parties are different. Do -- are any of you
10 familiar with that or do you have any views on whether that
11 case is -- has a policy similar to this one? Mr. Gable?

12 MR. GABLE: I am not. I will note though with regard
13 to Judge -- and I mean I'm familiar generally with the case,
14 I'm not familiar whether the exact policy language is in
15 effect. But I would note that Judge Glazer later issued an
16 order sustaining preliminary objections in a COVID coverage
17 case much like this. And in that order he said that he
18 invited, to the extent that his order and opinion in that case
19 was different from his opinion in the earlier case, that he
20 invited the parties to take the issue back up. So what I would
21 -- what I would surmise from that is that Judge Glazer having
22 spent a little more time contemplating whether COVID triggers
23 coverage under a property insurance policy, thought --
24 concluded that it didn't. But for whatever reason in that
25 first case he went ahead and denied preliminary objections.

1 But I do feel that he, before he left the Commerce Court he did
2 change his view on that.

3 THE COURT: All right. Ms. Kornfeld, any views?

4 MS. KORNFELD: Your Honor, the only thing I would
5 state is that with respect to courts that have addressed more
6 than one COVID case, we have seen a number of judges who in one
7 case have allowed the case to proceed and in another case have
8 not allowed the case to proceed. And we don't see that as a
9 judge changing his or her mind. We understand based upon what
10 the judges have said in those cases is that they believe that
11 different policy language and different facts warrant different
12 resolutions.

13 THE COURT: All right. You're not -- I gather
14 neither of you are aware of any case with the exact language of
15 this policy? Is that right, Ms. Kornfeld?

16 MS. KORNFELD: I don't believe that in Pennsylvania
17 -- I know that in Pennsylvania there are contamination
18 exclusions that look like this. But I would have to check
19 back, and we'd be happy to address that in a -- in the memo
20 that you invited --

21 THE COURT: Okay.

22 MS. KORNFELD: -- in looking at Judge Glazer's
23 opinion.

24 THE COURT: All right. All right. The next question
25 is, and this arises out of on page 12 of the amended complaint,

1 paragraph 35. The Plaintiff there points out that they are
2 proceeding under two applicable coverages. The first one
3 subparagraph A is property loss, time element losses resulting
4 from risk of physical loss or damage. And it's clear to me
5 that that is what is at issue here. But then they have a
6 second paragraph B under response costs/time element losses due
7 to actual presence of communicable disease at Eagle's locations
8 which provides up to \$1 million worth of coverage.

9 And I gather, Mr. Gable, that your position is that
10 you're providing coverage under that clause, under communicable
11 disease. Is that right?

12 MR. GABLE: That is correct. And I believe since the
13 -- since the --

14 THE COURT: Is that under reservation of rights or --

15 MR. GABLE: No, Your Honor. And I -- I believe this
16 is new, and it may be new to Ms. Kornfeld, so I apologize. My
17 understanding is that Factory Mutual has agreed to afford
18 coverage under the communicable disease provision. And that
19 the only issue right now is trying to figure out if the million
20 dollars in coverage that is -- exists under that has been
21 incurred. That's my understanding. That was not my
22 understanding at the time the complaint was filed and the time
23 that our motion to dismiss was filed. But that is my
24 understanding today.

25 THE COURT: All right. What -- what's the

1 Plaintiff's viewpoint?

2 MS. KORNFELD: Your Honor, with respect to the -- I
3 understand that Factory Mutual will be making a payment under
4 the communicable disease coverage. With respect to the
5 communicable disease coverage and the broader business
6 interruption coverage, time element coverage, our understanding
7 of how those two coverages work together, and it's based
8 actually on correspondence that we've received from Factory
9 Mutual, is that the communicable disease coverage is a very
10 narrow coverage that addresses certain response costs if
11 there's an event of communicable disease. And it doesn't
12 require direct physical loss or damage to property to trigger
13 the coverage.

14 As I was stating before, with respect to *Port*
15 *Authority*, there can be direct physical loss of or damage to
16 property by an invisible substance if there's enough of it.
17 And so the *Port Authority* standard requires some measurement of
18 the substance that would make the location dangerous. And so
19 in a circumstance where you don't have enough of it to be
20 direct physical loss of or damage to property, you're left with
21 only one coverage which is the commun --

22 THE COURT: All right. Well --

23 MS. KORNFELD: -- communicable disease coverage.

24 THE COURT: Excuse me for interrupting you, but
25 you're getting a little beyond my point. My question is is

1 when you drafted this complaint are you seeking coverage under
2 both of these?

3 MS. KORNFELD: Yes, Your Honor.

4 THE COURT: Okay. Are you prepared to agree now that
5 you are getting all the coverage you're entitled to under
6 paragraph B?

7 MS. KORNFELD: The communicable disease coverage?

8 THE COURT: Yeah. The communicable disease coverage.

9 MS. KORNFELD: Your Honor, I don't know the status of
10 that negotiation between --

11 THE COURT: Well, is that a factual issue in this
12 case?

13 MS. KORNFELD: Presently, yes.

14 THE COURT: Mr. Gable?

15 MR. GABLE: Yeah. Your Honor, I believe we've --
16 Factory Mutual has conceded the coverage applies with regard to
17 at least one of the locations. And then the question is just
18 how much. And if for some reason the response costs at one
19 location do not exceed the policy limit, then the -- Factory
20 Mutual will then move on to some of the other locations to see
21 whether the coverage has been triggered there.

22 THE COURT: Well, another question I have is whether
23 there is a strict dividing line between the property loss and
24 the communicable disease loss and whether there is any blending
25 or blurring that would present a factual issue as to if there

1 was -- if there was presence of communicable disease. I think
2 it was locations, which is the topic under paragraph B, 35(b),
3 whether that could be argued to also be physical loss or damage
4 to covered property as well as time element loss under
5 paragraph A.

6 MR. GABLE: Yeah, Your Honor. As Ms. Kornfeld said,
7 the policy, the communicable disease coverage does not have a
8 direct physical loss or damage trigger.

9 THE COURT: I understand that.

10 MR. GABLE: You can -- you can walk in so that --

11 THE COURT: No, no. That's not my question. My
12 question is that if Factory Mutual is conceding -- conceding is
13 the wrong word. The factual issue is agreeing that its policy
14 does provide coverage for the communicable disease coverage,
15 can the Plaintiffs argue that that agreement has some weight as
16 to whether there is also coverage under the property loss
17 provision.

18 MR. GABLE: Your Honor, we --

19 THE COURT: I know your answer is no. I want --
20 what?

21 MR. GABLE: Right. I'll explain why. I'll explain
22 why. The -- and this is in our brief. The communicable
23 disease coverage acts as an exception to the contamination
24 exclusion. And so the -- and other courts have found this as
25 well. And I hope they're cited in the brief, but I'll be glad

1 to supplement. The communicable disease give back in essence
2 is an exception to the contamination exclusion. And so it
3 doesn't operate to trigger any other coverage other than that
4 coverage afforded under the exception. It's an exception to an
5 exclusion. So we don't think that the acceptance of coverage
6 under that provision has any impact on the coverage for the
7 remainder of the policy.

8 THE COURT: All right. What's the Plaintiff's
9 position?

10 MS. KORNFELD: Yeah. Your Honor, the --

11 THE COURT: If any.

12 MS. KORNFELD: -- the only thing I'll note is that no
13 -- there are places in the policy where FM identifies certain
14 things as being exceptions to certain policy exclusions.
15 Nowhere does FM identify its communicable disease coverage as
16 being an exception to the contamination exclusion. And so we
17 don't agree that that's how it applies.

18 THE COURT: Well, I raise the same question I asked
19 you before. You don't make this claim in your complaint, as I
20 read it. And the question is, if you are making that claim do
21 you think you should amend your complaint? You don't have to
22 answer me now, but look, here's what I'm going to do. Just let
23 me consult with my law clerk about something before I finish up
24 here.

25 (Off record briefly.)

1 THE COURT: Okay. As I said, I would give you each a
2 short period of time to file a short supplemental memorandum.
3 All right. I think six pages is all I'm going to allow.
4 There's been so much briefing. So if you want to bring a case
5 to my attention, all you have to do is put the citation. That
6 only takes one line. You don't need to write a paragraph. We
7 will read the case.

8 How much time do you want? Would ten days be enough
9 from today? I don't want to ruin anybody's Thanksgiving
10 holiday. I could make it after Thanksgiving if you prefer or
11 before. Today is the 17th. So, Ms. Kornfeld, what's your
12 preference?

13 MS. KORNFELD: Your Honor, only because I'm closing
14 on a house tomorrow in Delaware --

15 THE COURT: Oh, good luck.

16 MS. KORNFELD: -- and Thanksgiving is happening.

17 THE COURT: I thought you were from Los Angeles?

18 MS. KORNFELD: I am.

19 THE COURT: Oh, okay. Are you leaving -- moving
20 East?

21 MS. KORNFELD: I'm not answering this question on the
22 record, Your Honor.

23 THE COURT: Okay. That's okay. All right. Well,
24 tell me what date -- what date you'd like? It's going to be
25 simul -- you're both going to file on the same day.

1 MS. KORNFELD: So if we -- if we could -- if we could
2 have two weeks from today --

3 THE COURT: Two weeks, okay.

4 MS. KORNFELD: -- Your Honor? If that would --

5 THE COURT: All right.

6 MR. GABLE: That's fine with me.

7 THE COURT: That would make it December 1st.

8 MR. GABLE: December 1st.

9 THE COURT: Is that all right with you, Mr. Gable?

10 MR. GABLE: That's fine, Your Honor.

11 THE COURT: Okay. 12/1, six pages. All right.

12 Please order a copy of the transcript of this argument and
13 share the costs, please, so I'll have it before then. Actually
14 I'd like to have the transcript -- well, two weeks would be
15 fine. There's -- I'll get it on the same day you get your
16 brief. All right. We'll -- I will try to decide this before
17 Christmas. That's not a promise. It's just a goal. Okay?

18 All right. Thank you very much for coming in. And
19 thank you.

20 Now, one other thing. If there's any -- if a judge
21 decides an issue that you think is relevant, I mean really
22 relevant, on these issues because this policy is different than
23 the others that I -- my view is that this policy is different
24 than the Cincinnati policies that I had decided and many other
25 policies that other judges in this court have decided, where I

1 think we've been unanimous so far that there is no coverage
2 under the language in those policies. But if you have a case
3 that you think is relevant, you -- first of all, if it's before
4 December 1st, just include it in your December 1st submission.
5 If it's after that, you're welcome to send me like a one line
6 letter. Now, please review this and put the citation on it
7 without any comment or any argument. Okay?

8 MR. GABLE: Understood.

9 MS. KORNFELD: Yes, Your Honor.

10 THE COURT: All right. Thank you all very much for
11 coming in. Stay safe and healthy.

12 MS. KORNFELD: Thank you.

13 MR. GABLE: Thank you, Your Honor.

14 MS. KORNFELD: Happy Thanksgiving.

15 MR. GABLE: Thank you, Your Honor.

16 (The proceeding concluded at 3:11 p.m.)

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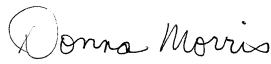
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C E R T I F I C A T I O N

I, Donna Morris, CET-1284, court approved transcriber, certify that the foregoing pages 1 to 30 is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

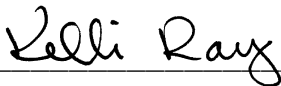


DONNA MORRIS, CET-1284

DATE: NOVEMBER 18, 2021

C E R T I F I C A T I O N

I, Kelli Ray, court approved transcriber, certify that the foregoing pages 31 to 50 is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.



Kelli Ray, CER-349, CET-349

Date: November 18, 2021